BEFORE THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF A $30,000 civil penalty assessed by the Department of Ecology against Cascade Pole Company regarding its Olympia facility,	PCHB No. 87-65
CASCADE POLE COMPANY, Appellant, v. STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, Respondent.	FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

THIS MATTER is the appeal of civil penalties totaling $30,000 assessed by respondent against appellant for alleged violation of Chapter 90.48 RCW and Chapter 70.105 RCW.

The matter came before the Pollution Control Hearings Board, Wick Dufford, Chairman, Lawrence J. Faulk, Member, and Judith A. Bendor, Member.

William A. Harrison, Administrative Appeals Judge, presided.

The hearing was conducted at Lacey, Washington, on February 2 and 3, 1988.

Appellant appeared by William D. Maer, Attorney at Law. Respondent, State Department of Ecology, appeared by Jay J. Manning, Assistant Attorney General. Reporter Gene Barker & Associates provided court reporting services. Respondent elected a formal hearing pursuant to RCW 43.21B.230.

Witnesses were sworn and testified. Exhibits were examined. Closing briefs were filed on March 8, 1988. From testimony heard and exhibits examined, the Pollution Control Hearings Board makes these

FINDINGS OF FACT

I

This matter arises at the Olympia facility of appellant, Cascade Pole Company ("Cascade"). The facility is located on ten acres at the tip of the Port of Olympia Peninsula which juts into Budd Inlet of Puget Sound.

II

Since its inception in 1939, the purpose of the facility has been to treat wooden poles with preservatives. The treated poles have been sold for use as utility poles, piling and other commercial purposes. Cascade bought the facility in 1957 and operated it until October 1986, when the facility was permanently closed. During Cascade's operations poles were pressure treated with creosote and, in

later years, a 5 percent pentachlorophenol (PCP) solution in medium aromatic oil.

III

This Cascade facility was involved in the prior case of Cascade Pole Co. v. State Department of Ecology, PCHB No. 86-105 (1987). We take official notice in this matter of our Findings, Conclusions and Order recently entered in that prior case. Therein, we found widespread soil contamination caused by escapement of preservatives from Cascade's operations. Cascade's preservative contaminants which have escaped to the soil are leaching continuously to groundwater which is in hydraulic continuity with the marine waters of East Bay of Budd Inlet. Groundwaters beneath the Cascade pressure chamber and tanks are severely contaminated, and the upper groundwater there exhibits the appearance of crude oil. Moreover, the contaminants continuously migrate through the groundwater to emerge in the sediments and waters of East Bay, and pose a direct threat to aquatic life. The situation is one of grave, continuous pollution of ground and surface waters.

IV

Waste discharge permits issued by the State to Cascade from 1957 to 1972 recite that:

> "Effluent from the oil separator is to be discharged on land to prevent phenols and napthaline from entering the estuary. Accumulated solids are to be disposed of in a manner approved by this Commission."

The "effluent from the oil separator" had its origins in the water which escaped from the logs as steam while preservatives were applied in the pressure tanks. This steam, once condensed back to water, was routed from the pressure tanks to other tanks known as gravity separators. Lighter oils contaminating the water would go to the top. Heavier oils would go to the bottom. The layer of water between the two weights of oil would then be drained to land but the oil was retained in tanks for re-use. According to an inspection report conducted by the State in 1962, the effluent "was clear and free from oil".

"Accumulated solids" referred to in the permit language above meant sludge such as accumulated in the creosote tanks. Oil and sludge was deposited on the sand fill adjacent to the plant and burned with other debris.

Neither the permitted effluent discharge nor the burning of sludge was a substantial factor in the severe contamination of the soil and groundwaters at issue. Substantial spills and leakage of preservative by Cascade onto the ground were the cause of this contamination. Such spills and leakage were neither required nor authorized by State permit.

V

State water pollution inspections of the Cascade facility from 1957-72 focused upon the adjacent surface waters of Budd Inlet and

apparently did not involve groundwaters. In 1972, it was noted that treating materials used by Cascade Pole were emerging from the tideland near the site of a former log storage pond which had been filled some seven years earlier. An interceptor drain was proposed by the State and built by Cascade to form a barrier at the mouth of the former pond. This served to protect surface waters. In 1972 neither the State nor Cascade had actual knowledge of the widespread underground contamination at Cascade's facility.

VI

In January, 1983, during excavation of a ditch for the sewer line to serve the East Bay Marina, workers discovered an oily substance seeping into the ditch near the Cascade facility. Respondent State Department of Ecology (DOE) was notified.

VII

The 1983 discovery of underground contamination, precipitated certain requirements by DOE that Cascade conduct underground sampling. By 1984, both DOE and Cascade had performed some inspections of the site but sampling by Cascade had not proceeded as DOE wished. A $6,000 civil penalty was therefore assessed by DOE against Cascade in 1985. Cascade appealed that penalty to this Board. The matter was settled by agreement of the parties to conduct further sampling.

VIII

Meanwhile, Cascade had also agreed to submit to DOE a "Remedial

Investigation" work plan for determining the extent of underground contamination. In April 1985, DOE reviewed the work plan and approved it with changes. The Remedial Investigation was to be followed by a "Feasibility Study" of clean-up procedures to be filed with DOE in March, 1986. At the due date, Cascade notified DOE that neither the Remedial Investigation nor the Feasibility Study were complete. Thus, in May 1986, DOE issued a regulatory order to Cascade reiterating formally the necessity of completing the Remedial Investigation and Feasibility Study. While continuing to work on the Remedial Investigation, Cascade appealed the DOE regulatory order to this Board challenging the authority of DOE to promulgate such an order. That appeal was our prior Cascade Pole, PCHB No. 86-105, cited above.

IX

On Friday, November 21, 1986, two DOE officials assembled laboratory equipment necessary to sample the underground contamination at the site. This equipment had been chemically cleaned and selected over the course of two days to assure the accuracy of sample analysis. The equipment was loaded into a van driven by the two DOE officials who arrived at the facility at 1:05 that Friday afternoon. The facility had been permanently closed for about one month when the DOE officials arrived. Thus, there were no supervisory personnel at the facility. Cascade's workmen remained at the site. The DOE officials asked the workman in charge for access onto the site to

take samples from a well (N-26). That well had been placed earlier by Cascade as a part of an investigation of underground conditions.

X

The Cascade workman asked the DOE officials to telephone a Cascade supervisor in Tacoma. They did so. The Tacoma supervisor said he would drive down, meet on the site at 3:00 p.m. and he, in fact, did so. Rather than admit the DOE officials, however, he telephoned another supervisor who in turn put the DOE officials in telehpone contact with Cascade's legal counsel in Seattle. Cascade's counsel asked the purpose of the sampling and was told that the sampling would be from well N-26 and would be analyzed for acid/base/neutral and oil and grease. Cascade's counsel asked by what authority DOE sought the samples. The DOE officials stated that they were proceeding under any or all of the Water Pollution Control Act, chapter 90.48 RCW, the Hazardous Waste Management Act, chapter 70.105 RCW, and the terms of Cascade's National Pollutant Discharge Elimination System (NPDES) permit. Cascade's counsel then denied permission for the DOE officials to take samples, although granted permission to go onto the site without taking samples. Cascade's counsel expressed concern that the DOE request to sample was not communicated sufficiently in advance to allow Cascade to retain technical representatives with expertise similar to the DOE officials in order to co-sample or split samples simultaneously with DOE.

Cascade's counsel offered to allow sampling with such a technical representative present on the following Monday. The DOE officials declined this invitation and, after touring the site without taking samples, returned to their offices.

XI

Following the above refusal of access for sampling, DOE sought a court order allowing access for sampling 1) without permission of Cascade and 2) without prior notice to allow participation of Cascade technical co-samplers. The Superior Court for Thurston county granted such an order to take samples at any reasonable time. When the order was entered, on December 4, 1986, DOE officials served the order upon Cascade, entered the facility and took samples of groundwater from the N-26 well in addition to soil samples.

XII

The samples taken on December 4, 1986, revealed the following:

1. Well N-26 groundwater: 190,000 parts per billion of pentachlorophenol (PCP).

2. Soil sample number 1: 940,000 parts per billion of PCP.

3. Soil sample number 6: 510,000 parts per billion of PCP.

4. Soil sample number 8: 450,000 parts per billion of PCP.

PCP is a preservative used by Cascade in its pole treatment since about 1964. Although DOE has not adopted numerical water quality standards for groundwater, a sense of perspective can be gained from looking at numerical water quality standards for surface waters. For

surface waters such as the Budd Inlet, deleterious material concentrations shall not adversely affect public health or cause toxic conditions to aquatic biota, WAC 173-201-045(3)(c)(vii). The DOE has quantified these values by adopting numbers developed by the United States Environmental Protection Agency. WAC 173-201-035(12). These numerical limits in the Budd Inlet would be, in parts per billion:

	Public Health	Aquatic Biota
PCP	1,010	53

As found in Cascade Pole, PCHB No. 86-105, these PCP groundwater contaminants have migrated to marine waters and have produced PCP readings in marine waters of 8.6 parts per billion while 53 parts per billion are toxic to aquatic life. Moreover, while the groundwater at issue is saline, and unfit for domestic uses, it would have had at least the potential for commercial or industrial uses such as washing or cooling. This is not so in its present state of contamination.

XIII

Cascade was told by DOE in December 1986, to expect civil penalty assessment based upon its refusal of sampling on November 21, 1986, and the sampling results of December 4, 1986.

XIV

On January 26, 1987, this Board issued its decision affirming the regulatory order appealed by Cascade in our PCHB No. 86-105, cited previously herein.

XV

On February 25, 1987, Cascade and DOE entered into a "Consent Order". This includes an agreed schedule for Cascade to file with DOE its Feasibility Study of clean up procedures. Preparation of the Feasibility Study has proceeded in accordance with this Consent Order. Since 1983 to December, 1987, Cascade has spent in excess of $460,000 in studies of contamination of its Olympia facility.

XVI

On March 2, 1987, DOE assessed civil penalties totaling $30,000 against Cascade as follows:

1. $15,000 for refusal of access to sample on November 21, 1986, for alleged violation of A) RCW 90.48.090, B) the NPDES permit granted to Cascade under RCW 90.48.180, and C) RCW 70.105.130(2)(d).

2. $15,000 for 1) discharge of material causing pollution of waters of the state under RCW 90.48.080 and 2) spilling or improperly disposing of designated hazardous waste under WAC 173-303-145(3).

Penalties for the above alleged violations are provided at RCW 90.48.144 and RCW 70.105.080.

XVII

Any Conclusion of Law deemed to be a Finding of Fact is hereby adopted as such.

From these Findings of Fact, the Board comes to these

CONCLUSIONS OF LAW

I

Respondent DOE, bears the burden of proof in a civil penalty case such as this one. See Yakima County Clean Air Authority v. Glascam Builders, Inc., 85 Wn.2d 255, 260, 534 P.2d 33, 36 (1975) likening the effect of a notice of penalty to the service of a summons in a civil action.

II

This matter concerns allegations involving the refusal of access for sampling on November 21, 1986, and substantive contamination allegations arising from the sampling done on December 4, 1986. We will first take up the substantive, then the access, allegations.

III

Substantive Contamination. The State Water Pollution Control Act provides at RCW 90.48.080:

> It shall be unlawful for any person to throw, drain, run, or otherwise discharge into any of the waters of this state, or to cause, permit or suffer to be thrown, run, drained, allowed to seep or otherwise discharged into such waters any organic or inorganic matter that shall cause or tend to cause pollution of such waters according to the determination of the commission, as provided for in this chapter.

The term pollution is defined within the chapter as follows:

> Whenever the word "pollution" is used in this chapter, it shall be construed to mean such contamination, or other alteration of the physical, chemical or biological properties, of any waters of the state, including change in temperature, taste, color, turbidity, or odor of the

> waters, or such discharge of any liquid, gaseous, solid, radioactive, or other substance into any waters of the state as will or is likely to create a nuisance or render such waters harmful, detrimental or injurious to the public health, safety or welfare, or to domestic, commercial, industrial, agricultural, recreational, or other legitimate beneficial uses, or to livestock, wild animals, birds, fish or other aquatic life. RCW 90.48.020.

IV

We conclude that appellant, on December 4, 1986, permitted or suffered the discharge of matter into waters of the state so as to cause or tend to cause pollution of such waters in violation of RCW 90.48.080.

V

As found in the prior case of Cascade Pole Company v. State Department of Ecology, PCHB No. 86-105 (1987) there is a continuing discharge of contaminants from soil on the Cascade site to waters of the state. The evidence in this matter shows that the continuing discharge of contaminants persisted to the day in question here, December 4, 1986.

VI

Cascade urges that the widespread underground contamination on its site originated with historical practices which were lawful under then applicable state permits. We disagree. As we have found (see Finding of Fact IV, above) neither the effluent discharge nor the burning of sludge was a substantive factor in the severe contamination of the

soil and groundwater at issue. That contamination resulted from regular leakage and spills of preservative by Cascade. Such spills and leakage were not condoned by State permit.

Moreover, while the inspections of the facility by the State were apparently not directed to below-ground conditions, the belated discovery of the contamination there does nothing to excuse it or render it lawful.

VII

The State Hazardous Waste Management Act, chapter 70.105 RCW, is implemented by the following regulation cited by respondent in the civil penalty notice:

> WAC 173-303-145 Spills and discharges into the environment. (1) Purpose and applicability. This section sets forth the requirements for any person responsible for a spill or discharge into the environment, except when such release is otherwise permitted under state or federal law. For the purposes of complying with this section, a transporter who spills or discharges dangerous waste or hazardous substances during transportation will be considered the responsible person. This section shall apply when any dangerous waste or hazardous substance is intentionally or accidentally spilled or discharged into the environment (unless otherwise permitted) such that public health or the environment are threatened, regardless of the quantity of dangerous waste or hazardous substance.
> (2) . . .
> (3) Mitigation and control. The person responsible for a nonpermitted spill or discharge shall take appropriate immediate action to protect human health and the environment (e.g., diking to prevent contamination of state waters, shutting of open valves).

The above regulation was adopted in 1982. It is appliable to "dangerous waste" or "hazardous waste" discharged "into the environment" according to the second underscored language in subsection (1), above. Because of this, it is necessary to show that the proscribed waste entered the "environment" since adoption of the rule in 1982 in order to sustain its violation. Respondent has not shown that on this record.

A discharge to the environment would occur with any spill or leakage of preservative to the soil. The latest evidence in this record of a spill or leakage event was in 1971. The regulation is violated only by a spill or leakage after the advent of the regulation in 1982.[1] Respondent has not proven a violation of WAC 173-303-145(3) alleged in the notice of penalty. The same is true of WAC 173-303-141 advanced in testimony at hearing.

VIII

Refusal of Access for Sampling. The State Water Pollution Control Act provides at RCW 90.48.090:

> The department [of Ecology] or its duly appointed agent shall have the right to enter at all reasonable times in or upon any property, public or private, for the purpose of inspecting and investigating conditions relating to the pollution of or the possible pollution of any waters of this state. [Brackets added.]

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[1] This is in contrast to the showing made by respondent under the Water Pollution Control Act, chapter 90.48 RCW, where the gravamen is "discharge to waters of the state". RCW 90.48.080. Ample evidence was presented that contaminants are presently discharging from the soil to groundwater.

On November 2, 1986, DOE sought entry to Cascade's facility at a reasonable time. It was within the normal working hours of a weekday. Moreover, the closure of the facility enhanced, rather than diminished the reasonableness of the visit precisely because the closure had left the site with no supervisory personnel. By the time in question, water pollution was more than a mere possibility to both Cascade and DOE. Appellant's position seems to add to the statutory right of entry a requirement of prior notice sufficient to allow consultants to be retained by the property owner to simultaneously co-investigate conditions. Yet that requirement is not in the statute. Likewise there is nothing to suggest that sampling soil or water is not within the ordinary meaning of the terms "inspecting and investigating" used in the statute. Appellant violated RCW 90.48.090 on November 21, 1986, by refusing access to DOE for groundwater sampling.

IX

The NPDES permit issued to Cascade provides at general condition 7 on page 7:

> The permittee shall, at all reasonable times, allow authorized representatives of the Department:
>
> a. To enter upon the permittee's premises for the purpose of inspecting and investigating conditions relating to the pollution of, or possible pollution of, <u>any of the waters of the state</u>, or for the purpose of investigating compliance with any of the terms of this permit.

b. To have access to and copy any records required to be kept under the terms and conditions of this permit.

c. To inspect any monitoring equipment or monitoring method required by this permit; or

d. To sample any discharge of pollutants. (Emphasis added.)

Although appellant's position seems to be that this provision is limited to the discharge regulated by the permit, the plain meaning of the words underscored above make this provision applicable to any discharge to any waters of the state. Appellant violated its NPDES permit on November 21, 1986, by refusing access to DOE for groundwater sampling.

X

The State Hazardous Waste Management Act provides at RCW 70.105.130(2)(d):

> The power granted to the department by this section is the authority to:
>
> (d) Enter at reasonable times establishments regulated under this section for the purpose of inspection, monitoring and sampling . . . (Emphasis added.)

Respondent has proven a violation of RCW 70.105.130(2)(d) alleged in the notice of appeal.

XI

Penalty Assessment. Where, as here on December 4, 1986, an individual civil penalty is assessed upon the basis that there has been one

violation in each of two separate statutes and there is no manifest intent to the contrary by respondent, we will presume that one half of the undivided penalty rests upon each statute. Having concluded that the alleged violations on December 4, 1986, under chapter 70.105 were not proven, we therefore reverse one half of the $15,000 civil penalty ($7,500) for the events of December 4, 1986. We proceed now to consider the remaining $7,500 assessment for December 4, 1986, and the $15,000 assessment for November 21, 1986.

XII

The State Water Pollution Control Act provides for maximum penalties of $10,000 per day for each violation. RCW 90.48.144. The State Hazardous Waste Management Act provides for maximum penalties of $10,000 per day for each violation. RCW 70.105.080. The assessed penalties are within the maximum afforded by those statutes.

XIII

The amount of penalty is to be set with regard to, " . . . the previous history of the violator and severity of the violation's impact on public health and/or the environment in addition to other relevant factors." RCW 90.48.144. We have deemed the actions taken by the violator to solve the problem as an additional relevant factor. A & M By-Products v. State Department of Ecology, PCHB No. 85-96 (1985) and City of Centralia v. State Department of Ecology, PCHB No. 84-287 (1985).

XIV

Amount of Penalty - Substantive Violation. Applying the penalty guidelines just set forth to the violation of RCW 90.48.080 relating to water pollution, on December 4, 1986, we conclude: 1) the previous history of the violator shows a protracted period of environmental abuse at this facility and 2) the impact of the violation on the environment is especially adverse because it contaminates from an embedded depth which makes it difficult to halt the contamination. We do not argue, however, that Cascade has been slow in taking action to solve the problem, given the magnitude of the problem. Neither do we deem the appeal taken by Cascade of the regulatory order to have been taken for the purpose of delay.

Despite actions taken to solve the problem, however, the very nature of the violation and the prior history of the violator fully justify the $7,500 civil penalty assessed, which should therefore be affirmed.

XV

Amount of Penalty - Denial of Access for Sampling. The denial of access for sampling was the first such incident shown on this record. Next, it was not shown that the purpose of the denial was to conceal evidence. Rather, the apparent purpose was to allow participation by appellant in the sampling. Conditions in the well were not shown to have changed materially between the time sampling access was refused and some two weeks later when sampling was taken. The penalty should

therefore be mitigated. However, the wrongful refusal resulted in lost time for DOE, diverting its attention from other matters. Likewise, a wrongful precedent was set by the refusal which, if repeated elsewhere, could substantially impair the ability of DOE to carry out its lawful responsibilities. See GATX Terminals Corporation v. DOE, PCHB No. 87-69 (1988). In view of all the factors pertinent to the refusal, the penalty should be mitigated to $2,500 and affirmed.

XVI

Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such. From these Conclusions of Law the Board makes this

ORDER

The violations of the Water Pollution Control Act, Chapt. 90.48 RCW, on December 4, 1986 are affirmed. The $7,500 penalty based on violation of RCW 90.48.080 is affirmed. The civil penalty under the authorities cited on November 21, 1986, for denial of access for sampling, is mitigated to $2,500 and affirmed. The foregoing when added together therefore total $10,000 in penalties affirmed.

DONE at Lacey, WA, this 29th day of June, 1988.

POLLUTION CONTROL HEARINGS BOARD

WICK DUFFORD, Chairman

LAWRENCE J. FAUX, Member 6/29/88

JUDITH A. BENDOR, Member

William A. Harrison

WILLIAM A. HARRISON
Administrative Appeals Judge

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF PHILIP E. CASSADY, Appellant, v. State of Washington DEPARTMENT OF ECOLOGY and KENMORE PRE-MIX COMPANY, Respondents.	PCHB NO. 87-66 FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On April 3, 1987, Philip E. Cassady filed an appeal with the Pollution Control Hearings Board, contesting the Washington State Department of Ecology's ("DOE") Order No. DE 87-N156 which authorized the Kenmore Pre-Mix Company to appropriate public groundwater in the the amount of 250 gallons per minute to a maximum withdrawal of 200 acre-feet per year for gravel washing from a sand and gravel mining operation. A formal hearing was held in Seattle on May 22, 1987. Present for the Board were members Judith A. Bendor (Presiding), Lawrence J. Faulk, (Chairman) and Wick Dufford, Member. Court reporter Bibi Carter of Gene Barker and Associates recorded the proceedings.

Appellant Cassady appeared pro se. Respondent Department of Ecology was represented by Assistant Attorney General Peter R. Anderson. Respondent Kenmore Pre-Mix Company was represented by its attorney, David C. Hall, of Preston, Thorgrimson, Ellis & Holman.

Witnesses were sworn and testified; exhibits were admitted and examined. Briefs were submitted and argument was heard. From the foregoing, the Board makes these

FINDINGS OF FACT

I

On June 19, 1986, the Department of Ecology (the "Department") received Kenmore Pre-Mix Company's application to appropriate groundwater. (Number G1-2439) Kenmore proposed to withdraw 800 gallons per minute of water from a 370 foot deep well located at an elevation of approximately 550 feet, one mile northeast of the City of Snoqualmie in King County (SE 1/4 and NE 1/4 of the SW 1/4 of Section 20), on property owned by the Weyerhaeuser Company.

II

A notice of the application to appropriate was published in the weekly Valley Record newspaper beginning August 21, 1986 and ending August 28, 1986. This paper is circulated, in part, in Snoqualmie and North Bend. Eleven objections to the application were received in the 30-day comment period, including one from appellant.

III

The Department reviewed Kenmore's groundwater Application, which included a July 1986 groundwater resource evaluation prepared for the applicant by Associated Earth Sciences, Inc., consulted with the King County Building and Land Development Division, and conducted a site visit. On February 27, 1987, the Department issued a Report of Examination of Application recommending approval of withdrawal of 250 gallons per minute, for a yearly maximum of 200 acre-feet, provided that an approved measuring device be installed and maintained in accordance with RCW 90.03.360, WAC 508-64-020 through -040.

The Department's final Order No. DE 87-N156 issued March 3, 1987 concluded that "water is available for a beneficial use," and that appropriation "will not impair existing rights or be detrimental to the public welfare" and approved appropriation as recommended by the Report.

Since DOE's Report and hearing memorandum (at p. 8) concedes that a meter meeting the specifications of Ch. 508-64 WAC is required by the permit, we treat the meter as part of the Order on appeal. Similarly, the Report recommended that the 12-hour on/off cycle be observed. We treat the Order on appeal as incorporating this condition as well.

IV

By way of background, the proposed appropriation/withdrawal is on a site that has been used for sand and gravel mining for at least 25

years. King County has issued a mitigated DNS (declaration of non-significance) for the mining operation for processing and extraction of one million cubic yards of sand and gravel. The County has also issued an unclassified use permit for this operation. The legal propriety of the sand and gravel operation itself is not an issue in this appeal.

V

Respondent Kenmore currently leases 60 acres from Weyerhaeuser. The current well is 6-inches, 370 foot in depth, which is capable of withdrawing 60 to 80 gallons per minute. Kenmore originally planned to install a 12-inch well, to 370 foot depth, capable of obtaining 800 gallons per minute.

VI

Two aquifers underlie the proposed Kenmore well. The upper aquifer is unconfined, and exists at elevations 344 to 164 feet. The lower aquifer would be the source of the proposed withdrawals. It is found at below elevations of approximately 146 feet and is recharged by waters from the Snoqualmie River drainage system and from leakage from the upper aquifer. It is found in medium to coarse grain sands of non-glacial origin.

Kenmore conducted a pump test of the existing well. The test showed that 200 to 250 gallons per minute are available from the lower aquifer for 12 hours of operation. The consultant recommended that the well not be pumped more than 12 hours on and 12 hours off. DOE's consultant's review of the Application and of nearby well logs confirmed this conclusion. DOE's review, in part, relied on Kenmore's consultant's report.

Kenmore plans to recycle some of the water, the extent to which is not known.

VII

Five hundred feet from the well is an unnamed stream flowing past the southeast corner of the site. There are no wetlands on the 60-acre leased property.

Rainfall in the area is approximately 50 inches per year. About half that amount is available for infiltration and recharging of aquifers.

VIII

Appellant Philip Cassady and other individuals who testified against the proposed appropriation live in an area known as The Highlands. This area, as the name implies, is located at higher ground, at elevations 200 feet and more above the proposed well, and more than a 1,000 feet distance.

IX

The Highland's wells withdraw water from aquifers which are not related to the one Kenmore proposes to use. Some Highlands' residences with shallow wells have been experiencing water pressure drops and water shortages during the summer. These shallow wells withdraw water from a perched aquifer which is primarily directly replenished from rainfall. These wells will not be affected by the proposal, as the aquifers are not related.

An additional margin of safety is provided by requiring the 12 hour on and off cycle. This regime will limit the cone of depression and prevent the Kenmore well from affecting any wells in any aquifers which are more than 1,000 feet away.

X

The proposed appropriation will not detrimentally affect surface waters, nor deprive wildlife of habitat.

Any Finding of Fact which is deemed a Conclusion of Law is hereby adopted as such.

From these Findings of Fact, the Board reaches these Conclusions of Law

CONCLUSIONS OF LAW

I

The Board has jurisdiction over this appeal.

II

Using water for mining gravel is a beneficial use. RCW 90.54.020.

III

The requirements of RCW 90.03.290 have been met, specifically that water is available for appropriation, that appropriation will not impair existing rights, and that no detriment to the public welfare has been shown. See, Stempel v. Department of Water Resources, 82 Wn.2d 109, 508 P.2d 166 (1973).

IV

The appropriation is categorically exempt from State Environmental Policy Act threshold determinations and EIS requirements, subject to the rules and limitations in WAC 197-11-305. WAC 197-11-800(4).

However, WAC 197-11-305(i)(b) provides that a proposal is not exempt from SEPA if:

> (b) The proposal is a segment of a proposal that includes:
> (i) A series of actions, physically or functionally related to each other, some of which are categorically exempt and some of which are not: or

This appropriation is a segment of the gravel mining operation which was issued a mitigated Declaration of Non-significance by King County. This appropriation is therefore not exempt from SEPA.

V

We conclude that the appropriation, as approved, will have no probable significant adverse impact on the environment. WAC

197-11-340. See, ASARCO v. Air Quality Coalition, 92 Wn.2d 685, 601 P.2d 501 (1979).

VI

Since our review of the permit is conducted de novo, we are concerned with the credibility of the information the DOE brings to our attention in seeking to have its decisions sustained. As long as the Department's judgment is based on credible factual information supporting its conclusions, its statutory investigative duties under RCW 90.03.290 have been fulfilled. For DOE to rely on applicant's consultant's report in reaching its decision presents, therefore, only an ordinary credibility question. Here we found, de novo, that the information provided is believable.

From these Conclusions of Law the Board enters this

ORDER

Order No. DE 87-N156, allowing appropriation of public groundwaters up to 250 gallons per minute, with pumping limited to 12 hours on and 12 hours off, up to a maximum of 200 acre-feet per year, and requiring the installation and maintenance of an approved measuring device in accordance with RCW 90.03.360, WAC 508-64-020 through -040 is AFFIRMED.

DONE this 9th day of September, 1987.

POLLUTION CONTROL HEARINGS BOARD

JUDITH A. BENDOR, Presiding

WICK DUFFORD, Chairman

9/9/87

LAWRENCE J. FAULK, Member

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF PUGET SOUND BY PRODUCTS Appellant, v. PUGET SOUND AIR POLLUTION CONTROL AGENCY, Respondent.	PCHB No. 87-68 FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This matter, the appeal of a Notice and Order Civil Penalty of $500 for causing or allowing the emission of an objectionable odor from appellant's property located at 2041 Marc Avenue, in Tacoma, Washington, on November 21, 1986, came on for hearing before the Pollution Control Hearings Board on September 3, 1987, in Seattle, Washington. Seated for and as the Board were Lawrence J. Faulk, (presiding), Wick Dufford, Chairman, and Judith A. Bendor. The proceedings were officially reported by court reporter Sandra Dirksen. Respondents elected a formal hearing pursuant to RCW 43.21B.230.

Appellant was represented by Attorney at Law, Randall L. St. Mary. Respondent Agency was represented by its attorney Keith D. McGoffin.

Witnesses were sworn and testified. Exhibits werre examined. From the testimony heard and exhibits examined, the Board makes these

FINDINGS OF FACT

I

Appellant Puget Sound By Products, a division of Darling-Delaware Company, operates a commercial rendering plant located within the highly industrialized tide flats area of Tacoma.

II

Respondent Puget Sound Air Pollution Control Agency (PSAPCA) is a municipal corporation with the responsibility for conducting a program of air pollution prevention and control in a multi-county area which includes the site of the appellant's facility. PSAPCA, pursuant to RCW 43.21B.260 has filed with this Board a certified copy of its Regulation I (and all amendments thereto), which is noticed.

III

On the morning of November 21, 1986, PSAPCA received a complaint from a citizen who works as the executive vice president for a company located less than half a mile from appellants' facility. The complainant, while working in her office, was being affected by an odor she found repulsive and highly objectionable. She testified that the odor made her nauseous, and was particularly strong during the

first hour or so of work: 8:00 to 9:00 a.m. She said that the smell was even more pronounced in her company's warehouse and that customers and other employees had complained to her.

Respondent Agency's inspector arrived at complainant's office that morning, at approximately 10:32 a.m., visited and spoke with the complainant and personally sniffed and verified a noticeable and distinct odor with unpleasant characteristics.

The inspector, during his visit, rated the odor as equivalent of a "2" on an odor rating scale ranging from 0 to 4, and delineated as follows:

0 - No detectable odor

1 - Odor barely detectable

2 - Odor distinct and definite, any unpleasant characteristics recognizable

3 - Odor strong enough to cause attempts at avoidance

4 - Odor overpowering, intolerable for any appreciable time.

This rating scale is used by PSAPCA not as regulatory standard, but as a shorthand method for preserving impressions for evidentiary purposes.

The inspector noted that the wind was blowing from the direction of appellant's facility to complainant's place of work. The complainant testified that the odor had abated somewhat by the time PSAPCA's inspector made his visit.

IV

After leaving complainant's office, the inspector proceeded to Appellant's facility and detected the same odor. The inspector contacted Mr. Bill Eckstein, plant manager, and advised that he had just verified an odor complaint. Mr. Eckstein stated they had received a number of barrels of mink bodies that morning. These barrels were dumped by hand requiring the receiving doors to be left half open. The inspector observed a semi-load of packing house waste awaiting dumping. Mr. Eckstein indicated they were currently cooking mink, fat and bones.

After leaving appellant's plant the inspector was called by radio and asked to return. When the inspector returned, Mr. Eckstein advised that he had discovered that the water pump on the stainless steel scrubber was not operating. He said the plant was being shut down to repair the scrubber pump.

V

Normally deliveries of animal wastes are hydraulically dumped from the delivery trucks into a hopper immediately adjacent to the plant's large receiving doors. The doors are usually open only briefly during this process. However, on the morning of November 21, 1986, the manual dumping of the open-topped barrels of mink bodies took longer than the usual procedure, requiring the doors to be kept open for 20 or 25 minutes.

VI

The scrubber which experienced a pump outage on November 21, 1986, is a part of Puget Sound By Product's odor control equipment. It is designed to reduce cooking odors from the rendering process.

After the pump shut-off was discovered, the company immediatley set about to rectify the outage. The difficulty was traced to a circuit breaker which had tripped and the scrubber was back on the line with the pump running about 20 minutes after the shut down. Since then some lights have been added so that it is easier to observe a problem of this kind.

VII

On November 21, 1986, Notice of Violation (No. 20742) was issued to Puget Sound By Products for allegedly violating Section 9.11(a) of PSAPCA Regulation I and WAC 173-400-040(5) on November 21, 1986.

VIII

On March 18, 1987, Notice and Order of Civil Penalty No. 6640 was sent to appellant assessing a penalty of $500 for the alleged violations on November 21, 1986. From this, appellant appealed to this Board on April 10, 1987.

IX

While the precise cause of the odor problem was not made clear, the Board finds on the record before it, that the odors complained of emanated from Appellant's facility and that they did, in fact,

unreasonably interfere with the enjoyment of life, and property on the date involved here.

X

Puget Sound By Product has experienced some problems with odor control in the past, but presently possesses advanced control equipment. Three civil penalties have been issued by the agency to this source. One fine was vacated and one fine was affirmed by this Board, while one was paid by the company. The company has incurred no penalty liability for seven years.

XI

Any Conclusion of Law which is deemed a Finding of Fact is hereby adopted as such.

From these Findings of Fact, the Board comes to these

CONCLUSIONS OF LAW

I

The Board has jurisdiction over these persons and these matters Chapters 43.21 and 70.94 RCW.

II

Under terms of Section 9.11 (a) of PSAPCA Regulation, certain air emissions are prohibited. This section reads as follows:

> (a) It shall be unlawful for any person to cause or permit the emission of a contaminant in sufficient quantities, and of such characteristics and duration as is, or is likely to be, injurious to human health, plant or animal life, or property, or which unreasonably interferes with the enjoyment of life and property.

WAC 173-400-040(5) is substantially to the same effect. This formulation parallels the definition of "air pollution" contained in the State Clean Air Act at RCW 70.94.030(2). The language is similar to the traditional definition of nuisance. See RCW 7.48.010.

III

On November 21, 1986, odors emanating from appellant's plant wafted onto nearby property and had such effects on the enjoyment of life and property as to violate Section 9.11(a) of Respondent's Regulation I, and WAC 173-400-040(5).

IV

Although Puget Sound By Products operates a facility which usually controls odors effectively, the Washington Clean Air Act, and the regulations implementing it, set forth a strict liability standard. By setting forth such a standard, the legislature has determined that neighbors should not bear the burden of the offensive odors.

Here the penalty imposed is only one-half the ordinary maximum and one-tenth the limit provided for aggravated cases. Under all the facts and circumstances, we do not believe the penalty assessed here was unreasonable.

V

Any Finding of Fact which is deemed a Conclusion of Law is hereby adopted as such.

From these Conclusions of Law the Board enters this

ORDER

Notice and Order of Civil Penalty Number 6640 issued by PSAPCA is affirmed.

DONE this 22nd day of September, 1987.

POLLUTION CONTROL HEARINGS BOARD

9/22/87

LAWRENCE J. FAULK, Presiding

WICK DUFFORD, Chairman

JUDITH A. BENDOR, Member

BEFORE THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

GATX TERMINALS CORPORATION, Appellant, v. STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, Respondent.	PCHB NO. 87-69 FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This matter involves GATX Terminal Corporation's appeal of the State of Washington Department of Ecology's issuance of a $5,000 civil penalty (No. DE 86-S178) for alleged violations on November 14, 1986 of waste discharge permit conditions (No. WA-000041-8) at their facility in Vancouver, Washington.

A formal hearing was held on October 2, 1987 in Vancouver. Present for the Board were: Judith A. Bendor (Presiding), Wick Dufford (Chairman), and Lawrence J. Faulk (Member). Attorney Lawrence E. Hard of LeSourd & Patten represented appellant GATX. Assistant Attorney

General Jeffrey S. Myers represented respondant Department of Ecology. Court Reporter Tami L. Kein recorded the proceedings.

Briefs were received. Witnesses were heard; exhibits were admitted and examined. Argument was made. From the foregoing the Board makes these

FINDINGS OF FACT

I

Appellant GATX Terminal Corporation operates a chemical processing facility and packing plant located in the Port of Vancouver, Vancouver, Washington. Among other products, the plant produces antifreeze. An array of chemicals are present on site, including ethylene glycol, an ingredient of antifreeze.

At all times relevant, GATX's discharges into the Columbia River were subject to the terms and conditions of National Pollution Discharge Elimination System ("NPDES") Waste Discharge Permit (No. WA-000041-8) issued by the State of Washington Department of Ecology ("DOE").

II

The DOE is a state agency authorized to implement the State water pollution control statutes, and in that capacity, to issue NPDES permits for the discharge of industrial wastewater into waters of the state, and to monitor compliance with the terms and conditions of such permits. RCW 90.48.180 and 90.48.260.

III

The NPDES permit for the GATX facility was issued on August 16, 1978. It was modified in 1980, to allow the discharge of 700 gallons per day of untreated, uncontaminated storm water to the Columbia River

The permit contains General Conditions, of which the following are relevant:

> G1. All discharges and activities authorized herein shall be consistent with the terms and conditions of this permit. The discharge of any pollutant more frequently than or at a level in excess of that identified and authorized by this permit shall constitute a violation of the terms and conditions of this permit.
>
> [. . .]
>
> G5. The permittee shall at all times maintain in good working order and efficiently operate all treatment or control facilities or systems installed or used by the permittee to achieve compliance with the terms and conditions of this permit.
>
> [. . .]
>
> G7. The permittee shall, at all reasonable times, allow authorized representatives of the Department:
>
> a. To enter upon the permittee's premises for the purpose of inspecting and investigating conditions relating to the pollution of, or possible pollution of, any of the waters of the state, or for the purpose of investigating compliance with any of the terms of this permit.
>
> b. To have access to and copy any records required to be kept under the terms and conditions of this permit.

c. To inspect any monitoring equipment or monitoring method required by this permit; or

d. To sample any discharge of pollutants.

[. . .]

The general conditions also prohibit the discharge or bypass of any discharge from facilities used by the permittee to maintain compliance with the permit's terms and condition (G3), except under specified situations. Any diversion or bypass must be immediately reported to the Department, and remedial action must be immediately taken to stop the unauthorized discharge and to correct the problem. G4. Such reporting action does not relieve the permittee from responsibility to maintain continuous compliance with permit conditions or from liability for failure to comply. G4.

IV

In September 1986, trained DOE employees were on the Columbia River looking at discharges and saw what appeared to them to be a discharge of antifreeze coming from the GATX outfall and going into the River. The discharge was pink in color. DOE did not inform GATX about the September observations and no penalty was issued. Instead, DOE used this observation to prioritize its' review of monitoring data and its' reissuance of NPDES permits. The GATX permit had technically expired in 1983, but was still in effect because no new permit had been issued.

V

On Friday, November 14, 1986 two DOE inspectors saw a constant three to five gallons per minute green-colored discharge flowing out of the GATX outfall into the River. There was a green plume in the River and green blotches on rocks in the River. Photographs were taken.

VI

The inspectors went to the GATX reception area and asked to speak with a person authorized to make decisions. Mr. Merv Murphy, the operations manager for the past year, came out. He is in charge of the plant when the plant manager is gone.

The inspectors identified themselves. Together they walked out to see the discharge. The inspectors said they were going to sample and suggested Mr. Murphy concurrently take one; he did not do so. The manager went back into the building. The inspectors took 2 samples, one from the outfall discharge and one from the River, and also took additional photographs. No dead fish were seen.

Mr. Murphy rejoined them. The inspectors said they wanted to enter the packaging plant to do an inspection. The manager said he had strict instructions not to allow anyone to enter. One inspector explained the permit and the condition which required the permittee to allow DOE representatives access to inspect. The inspector further

explained that the permit was required to be on the premises and suggested Mr. Murphy try and find it. By this time, the discharge had ceased. The operations manager did not know where the permit was. He believed that DOE was required to have a search warrant to enter.

The inspectors renewed their request to inspect and said they would wait 20 minutes. During this time Mr. Murphy attempted to reach the plant manager, Mr. Martin, and other GATX management in the area, but was not successful. He did not call company headquarters in Chicago. The inspectors waited 20 minutes; during that time they were not granted entry to the plant. They then left.

VII

The plant manager, upon subsequently learning about the access problem, called DOE later that same day. He spoke with one of the inspectors the next work day, Monday, November 17, 1986, and gave them permission to enter the plant. The DOE inspectors returned, inspected the plant, and explained to the plant manager that the November 14, 1987 discharge and refusal to allow entry had violated the permit, and that a penalty would issue.

VIII

The laboratory tests, done at the Environmental Protection Agency laboratory in Manchester, Washington, revealed the presence of ethynol glycol in both samples.

IX

The discharge occurred because a valve located in the plant's yard area had been left open. This valve prevents the release of contaminated wastewater into the River by sending it instead into a holding tank. Due to the open valve, ethynol glycol contamination instead discharged into the River. The exact source of this contamination from within the plant was not determined. During the inspection, the operations manager shut the valve and reclosed the entry lid. He did not inform the inspectors of what he did, nor was he asked.

Since the inspection, GATX has installed a flagging system on the valve to clearly show when it is open, and a $100 chain and lock now secure the entry lid.

X

GATX had a copy of the NPDES permit on-site, but personnel there neither knew its' location nor were familiar with its' condition requiring inspection access. The Company had a manual, Environmental Guidelines, on-site, which is written for all GATX facilities nationwide. This GATX document provides a general overview of national environmental laws, but does not provide specific instructions to personnel regarding NPDES inspections, either nationally or specifically to Washington State.

GATX also had on-site a Safety Policy and Procedures Manual. The manual did not address DOE inspections. It did, however, provide instructions to personnel that Occupational Safety and Health inspectors are required to show a court-issued search warrant, and until company counsel in Chicago review the warrant and supporting affidavits, entry "shall not be allowed." (Exh. A-6).

We find that GATX had not provided adequate employee training on the NPDES permit inspection condition.

XI

On January 21, 1987, the Notice of Penalty (No. DE 86-S178) was issued for $5,000. This is only one-quarter the maximum amount of penalty possible. GATX applied to the Department for relief from the penalty, which was denied on March 26, 1987. On April 13, 1987, GATX filed a timely appeal with this Board.

DOE has not previously issued any penalties to GATX..

XII

Any Conclusion of Law which is deemed a Finding of Fact is hereby adopted as such.

From these Findings of Fact, the Board comes to these

CONCLUSIONS OF LAW

I

The Board has jurisdiction over these parties and these matters. Chpts. 43.21B and 90.48 RCW.

II

RCW 90.48.160 requires industrial operations which release liquid waste to waters of the state to obtain a permit. The NPDES permit issued to appellant GATX is an example of such a permit and fulfills the demands of both state and federal law. RCW 90.48.260. The permit was issued under the authority of RCW 90.48.180.

III

RCW 90.48.144 empowers the Department of Ecology to impose civil penalties on a strict liability basis. In pertinent part, it states:

> Every person who:
>
> (1) Violates the terms or conditions of a waste discharge permit issued pursuant to RCW 90.48.180 [. . .]
> (3)[. . .] shall incur, in addition to any other penalty as provided by law, a penalty in an amount of up to ten thousand dollars a day for every such violation. [. . .] (Emphasis added)

The Notice of Civil Penalty Incurred and Due (No. DE 86-S178) asserts that both the ethylene glycol discharge and the denial of access violated the NPDES permit "in violation of RCW 90.48.180".

Appellant argues that RCW 90.48.180 applies only to counties, municipalities and public corporations. This is not the case. The section was a part of the original statute enacted in 1955 and has always referred to all discharges required to obtain permits. See Sections 1 and 3, Chapter 71, Laws of 1955. Appellant hsa apparently been misled by the bold print section title added by the codifier.

This, of course, is not a part of the statute.

Appellant also argues that actions must violate RCW 90.48.080 in order for a penalty to be issued. The plain language of RCW 90.48.144 authorizing penalties for permit violations refutes this contention.

IV

The discharge of ethylene glycol into the Columbia River was a discharge not authorized by the NPDES permit. The permit only authorized discharge of uncontaminated stormwater. Therefore the November 14, 1986 discharge violated the NPDES permit and RCW 90.48.144.

V

We conclude that the access request was reasonable and the denial of access violated the permit and RCW 90.48.144.

The access violation is cause for particular concern. This inspection access requirement is a prerequisite for Ecology's participation in the federal NPDES program. EPA regulations require a state program to include certain conditions in its permits. See 40 CFR Section 122.25(12). EPA requires that permits allow inspectors to

> (1) Enter upon the permittee's premises where a regulated facility or activity is located or conducted,
>
> [. . .]
>
> (3) Inspect at reasonable times any facilities, equipment (including monitoring and control equipment), practices or operations regulated or required under this permit; and

(4) Sample or monitor at reasonable times, for the purposes of assuring permit compliance or as otherwise authorized by the Clean Water Act, any substances or parameters at any location. (Emphasis added)

Such inspections are a necessary part of a State regulatory effort. State personnel are limited, and the State cannot properly perform NPDES regulatory functions if denied reasonable access and required to return at a later time. GATX's compliance with the NPDES permit clearly and unequivocably requires reasonable access for inspection. (G7). Moreover, GATX personnel were not properly trained nor were clear written guidance provided on NPDES access provisions.

VI

In this instance, the scope of discharge was not severe. However, the remedy was obvious and inexpensive, and the violation could easily have been prevented. (In so concluding, we do note with some concern that by September 1986 DOE was aware that unlawful discharges may have been occuring and failed to warn GATX. A mere telephone call may have sufficed.)

VII

The purpose of civil penalties is to promote the violator's and the general public's compliance with the laws. In determining the proper amount of penalty, the severity of the violation, the conduct

of the violator prior to the violation and any remedial action taken are to be considered.

VIII

In 1985 the legislature increased the statutory penalty maximum to $10,000 per violation per day, reflecting an intent to treat actions contravening the water pollution control statute with increased seriousness. Section 2, Chpt. 316, Laws of 1985. Weyerhaeuser Company v. DOE, PCHB Nos. 86-224 and 87-33 (March 28, 1988); Bud Vos v. DOE, PCHB No. 86-149 (May 8, 1987). Here two distinct violations occurred and, therefore the total statutory maximum available was $20,000. The Department of Ecology only assessed one-fourth of the total fine permitted. Under all the facts, we conclude that the penalty assessed in this case was reasonable.

IX

Any Finding of Fact which is deemed a Conclusions of Law is hereby adopted as such.

From these Conclusions of Law, the Board enters this

ORDER

The penalty is AFFIRMED.

SO ORDERED this 24th day of June, 1988.

POLLUTION CONTROL HEARINGS BOARD

JUDITH A. BENDOR, Presiding

WICK DUFFORD, Chairman

6/24/88

LAWRENCE J. FAULK, Member